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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37446-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II

DAVID KOENIG,
Appellant,

v.

THURSTON COUNTY AND THE THURSTON COUNTY PROSECUTING ATTORNEY,
Respondent

THURSTON COUNTY'S RESPONSE TO *AMICUS CURIE* BRIEF

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I. INTRODUCTION

This Court granted the Washington Coalition For Open Government's motion to file an Amicus Curiae Brief which presents three arguments: (1) the purpose of the ch. 42.56 RCW, Public Records Act (PRA), is to provide for open government, (2) the Public Records Act allows redaction, and (3) an agency should be severely penalized when it withholds a statement by a victim describing how a crime personally affects him or her as well as a SSOSA psychological evaluation prepared by a health professional. While Thurston County agrees the policy behind the PRA is to provide governmental transparency, the County disputes such policy should ignore the legislature's mandate to protect certain documents. A victim impact statement (VIS) and a psychological evaluation (PE) are personal and private documents which should not be made available from a prosecuting attorney's office to the public.

II. ARGUMENT

The Washington Coalition For Open Government fails to explain how disclosure of the content of two documents containing personal information about two private individuals will assist the public in making government open and accountable. It is the County's position that the content of both documents does not provide any information relating to

the conduct of government. Furthermore, redaction of the documents is not required under the facts of this case.

A. The Policies Of The PRA Do Not Support Disclosure In This Case.

The brief of Amicus Curiae correctly points out the purpose of the PRA which mandates broad disclosure of public records. The County agrees with this principle. However, the policies of the PRA only apply to documents containing information relating to the conduct of government. A "'Public record' includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function..." RCW 42.56.010(2). The point made by the brief of Amicus Curie, which the County agrees with, is that documents containing information relating to the conduct of government should be open to public scrutiny, subject to certain exemptions. The public has a right to know how their government conducts its business. In this case, the two documents do not contain information relating to the conduct of the County. A victim's statement in her own words provided to a judge stating how a crime has affected her personally does not contain any information relating to the conduct of the Prosecuting Attorney's Office (PAO) or the County.

Similarly, the PE provides details of a defendants personal life. Like the VIS, the evaluation does not "contain" information relating to the

conduct of the County. The purpose of the PRA is to allow transparency for the public to see how government is being run. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PRA does not provide an open invitation for the public to review documents that are not prepared by a governmental agency and which only contain personal information regarding members of the public.

The fact that the PAO has reviewed the documents does not convert the *content* of the documents into information relating to the conduct of government. The disclosure of two documents that were not prepared by a public officer and that do not contain information about a public agency would not assist the public with governmental transparency. The PRA does not support the argument that the public needs to know personal information about specific, private individuals in order to retain sovereignty over the government. The polices behind the PRA for open government do not apply to the VIS and the PE in this matter.

B. Redaction Is Not Required For The VIS and PE.

Parroting Appellant Koenig's brief in this matter, the Washington Coalition For Open Government argues the VIS and PE should have been redacted and disclosed. First, it must be remembered the original request was for the complete PAO criminal file. Redaction was not ignored by the County. For example, the police report was disclosed with redactions. CP

51. Out of the requested information, the VIS and PE were determined to be exempt in their entirety, pursuant to RCW 42.56.240(1), as nondisclosure is essential to effective law enforcement and for the protection of the victim and the defendant's right to privacy.

While the County's response brief explains why the two exemptions apply, it is worth re-emphasizing several important points to address the "redaction" issue raised by Amicus Curiae. The documents are not prepared by the police or the PAO. Instead, the VIS is voluntarily prepared by the victim of a crime and the PE is voluntarily provided by the defendant. Neither the victim nor the defendant are forced to prepare the information. The only evidence in the record supports the fact that both of these tools are essential to effective law enforcement. Furthermore, the evidence also supports the argument that the tools will not be effective if the VIS and PE are provided to anyone that asks for them as the crime victim and defendant will not be willing to divulge private information that will be available to the public forever. A victim would not want to disclose personal impacts if members of the public could obtain a copy through a PRA request. A certified sex offender treatment provider wouldn't be able to obtain all the information necessary to treat an offender if the PE is allowed to be disclosed to anyone that asked for it. This is supported by the facts of this *specific* case. Not only did the trial

court seal both sensitive documents, the victim and treatment provider have included declarations which show the private nature of the documents and what affects disclosure would have on the process. CP 125-127; CP 100-103.

It is also important to note the VIS contains the words of the victim and the PE is prepared by a fully certified sex offender treatment provider (defined as a health professional under RCW 18.155.020). Both documents are exclusively personal. The VIS is exclusively the personal and private feelings of the victim and the PE contains personal information for the treatment of the defendant. This is different from a police report that is prepared by a public agency. The Court in *Cowles Publ'g v. Prosecutor's Office*, 111 Wn. App. 502, 45 P.3d 620 (2002), held that redaction was not required when documents consist almost entirely of personal information. *Id.* at 510-511. Similarly, the information contained in the VIS and PE is entirely personal information. As explained in the County's response brief, the personal information is exempt as nondisclosure is essential to effective law enforcement and for the protection of the right to privacy. RCW 42.56.240(1).

The Washington Coalition For Open Government cites to *Prison Legal News v. Dep't of Corr.*, 154 Wn.2d 628, 115 P.3d 316 (2005), for the proposition that redaction can be utilized even if the requested

document involves health care information. However, *Prison Legal News* is distinguishable as that case involved a blanket request for records prepared by a state agency covering many individuals, not a single health care record for a specific, identifiable individual. *Prison Legal News* held that if health care information is readily identifiable with a patient, then disclosure would not be required. *Id.* at 645-48. In the case at hand, the PE is clearly identifiable with a specific individual. Redaction would not leave any part of the PE left to disclose as it is health care information identifiable with a specific individual.

The bottom line is the County did in fact provide many documents to the Appellant Koenig in response to his multiple requests. CP 51, CP 66-67, CP 69-72. Some were provided in their entirety while others were provided with redactions. The VIS and PE were withheld in their entirety as they only contained personal information the nondisclosure of which was essential to effective law enforcement and for the protection of the right to privacy.

C. Discussion Regarding A Penalty Is Premature.

Washington Coalition For Open Government argues the PAO should receive an *increased* penalty in this matter due to its bad faith. First, the PAO has not been assessed any penalty by the trial court as the PAO was found to have complied with the PRA. Accordingly, the trial

court has not had a penalty hearing in which evidence regarding a penalty has been presented. Amicus Curiae's cry for an *increased* penalty is premature and should be disregarded.

Additionally, the PAO has a right to rely on the legislature's directives regarding the VIS and PE.

> ...The legislature further intends to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.

RCW 7.69.010.

> The legislature finds that:
> ...
> (4) Persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.

RCW 70.02.005(4). To argue that a deputy prosecuting attorney was acting in bad faith when s/he didn't give out a victim's statement and a defendant's health care information flies in the face of the legislature's directives.

With respect to the VIS, the only evidence in the record indicates that the VIS was sealed by the trial court and the victim herself does not

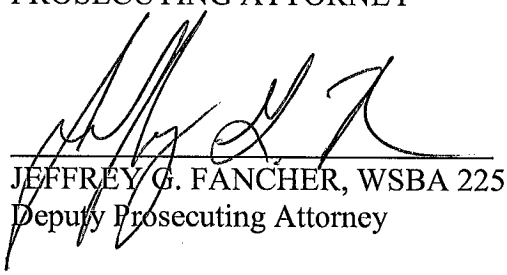
want her personal thoughts provided to anyone who asks for it. The PAO followed the legislature's directive by not disclosing the VIS. Similarly, the PAO received the PE as part of its sentencing investigation function. Pursuant to RCW 70.02.005(4) and 70.02.050, the PAO could not disclose this document without the patient's authorization. The PAO did not act in bad faith by not disclosing the VIS and PE.

III. CONCLUSION

The PAO in this case did not blindly withhold documents. The evidence indicates the request was taken seriously and redaction was utilized for several of the documents disclosed to Koenig. The VIS and PE were not subject to disclosure as both documents met the two exemptions found in RCW 42.56.240(1). Transparency in government does not require the disclosure of personal information about a victim of a crime and medical information about a defendant. Accordingly, the decision of the trial court must be upheld as a matter of law.

DATED this 16 day of January, 2009.

EDWARD G. HOLM
PROSECUTING ATTORNEY



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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: January 16, 2009 Signature: Sandra Lopez

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